

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DEBRA C. EVANS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 179,663
<b>THE BOEING CO. - WICHITA</b>	)	
Respondent	)	
AND	)	
	)	
<b>AETNA CASUALTY &amp; SURETY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant requested review of the Award dated September 19, 1995, entered by Administrative Law Judge Shannon S. Krysl. The Appeals Board heard oral argument on February 6, 1996.

**APPEARANCES**

Roger A. Riedmiller of Wichita, Kansas, appeared for the claimant. Frederick L. Haag of Wichita, Kansas, appeared for the respondent and its insurance carrier. John C. Nodgaard of Wichita, Kansas, appeared for the Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

The Administrative Law Judge awarded claimant permanent partial disability benefits for an 8 percent functional impairment to the right upper extremity. Claimant asked the Appeals Board to review the following issues: (1) nature and extent of claimant's injury and disability, and (2) whether the Administrative Law Judge erred by refusing claimant permission to introduce rebuttal evidence.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be set aside and this proceeding should be remanded to the Administrative Law Judge for further consideration.

This proceeding should be remanded to the Administrative Law Judge to provide the parties an opportunity to gather the complete evidentiary record for the Administrative Law Judge's consideration. As indicated in respondent's submission letter, claimant was deposed on June 29, 1995, to complete her regular hearing testimony. Respondent's counsel referred to testimony given at that deposition when examining Karen Terrill. However, the transcript of the June 29, 1995, deposition is not shown in the Award as part of the evidentiary record considered by the Administrative Law Judge and was not contained in the documents forwarded to the Appeals Board for this review.

Additionally, when viewing the videotapes introduced at Rayford Kimery's deposition, the Appeals Board found that the videotape marked Exhibit No. 1 is a copy of a Kansas Bar Association presentation entitled "Preparing for Your Deposition" rather than the videotape of claimant's activities on June 7, 1995.

The Appeals Board finds that the transcript of claimant's June 29, 1995, deposition and the correct videotape should be provided to the Administrative Law Judge for consideration before an Award is entered in this proceeding.

The Appeals Board also finds that claimant should be entitled to present evidence to rebut Rayford Kimery's testimony and the videotapes introduced at his deposition. As the Administrative Law Judge indicated in the Award and as the parties argued, claimant's credibility is absolutely critical to her claim. Although the better procedure is to make a proffer of evidence on the record, in this instance claimant's failure to do so is not fatal and the Appeals Board finds that claimant should be permitted the opportunity to introduce rebuttal evidence within the parameters to be set forth by the Administrative Law Judge.

Rebuttal testimony is evidence presented in denial of some fact which the adverse party has attempted to prove. See Enlow v. Sears, Roebuck & Co., 249 Kan. 732, 742, 822 P.2d 617 (1991). Through Rayford Kimery's testimony, the respondent attempted to prove that claimant was both self-employed and physically capable of performing certain

physical activities. Claimant should be permitted to present evidence regarding those questions of fact.

Based upon the above, this proceeding should be remanded to allow claimant to present rebuttal evidence, allow the parties to gather the entire evidentiary record, and allow the Administrative Law Judge to consider the entire record in determining the issues presented.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated September 19, 1995, should be, and hereby is, set aside and that this proceeding is hereby remanded to the Administrative Law Judge for further proceedings as indicated above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS  
Frederick L. Haag, Wichita, KS  
John C. Nodgaard, Wichita, KS  
Office of Administrative Law Judge, Wichita, KS  
Philip S. Harness, Director